

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

THE SCOTT FETZER COMPANY,	)	CASE NO.: 1:16 CV 1570
	)	
Plaintiff,	)	JUDGE DONALD C. NUGENT
	)	
v.	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

**MOTION FOR ENTRY OF JUDGMENT AND TO SET FEE HEARING**

Plaintiff, The Scott Fetzer Company (“Scott Fetzer”) moves this Honorable Court to enter judgment on Scott Fetzer’s First Claim for Declaratory Judgment and Breach of Contract (“First Claim”) against Zurich American Insurance Company (“Zurich”) pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit. (Doc. 60). Additionally, Scott Fetzer moves this Court to set a hearing on damages, including attorneys’ fees, as it is the sole remaining issue on its breach of contract claim. The grounds for this motion follow.

On December 18, 2017, this Court entered judgment granting Zurich’s Motion for Summary Judgment, denying Scott Fetzer’s Motion for Partial Summary Judgment on its First Claim, and terminating the present action. (Docs. 55, 56). Thereafter, Scott Fetzer appealed this Court’s Memorandum Opinion and Order and Judgment Entry to the Sixth Circuit. (Doc. 57). On April 30, 2019, the Sixth Circuit issued its Opinion reversing this Court’s judgment and remanding the case with instructions to enter judgment for Scott Fetzer on Scott Fetzer’s Motion for Summary Judgment. (*See Scott Fetzer Co. v. Zurich Am. Ins. Co.*, 769 F. App’x 322, 329 (6th Cir. 2019), attached as Exhibit A.) A true copy of the Sixth Circuit’s mandate was entered on the docket on

May 24, 2019. (Doc No. 60). Thus, pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit, Scott Fetzer moves this Court to enter Judgment in Scott Fetzer's favor on its Motion for Partial Summary Judgment.

Pursuant to the Sixth Circuit's mandate, the judgment thereunder to be entered by this Court will constitute a judicial determination that Zurich breached the contract by not recognizing that only one deductible applied. As a result, the amount of Scott Fetzer's damages, including attorneys' fees incurred on its breach of contract claim will be the sole remaining question. Notably, Scott Fetzer is unequivocally entitled to recover damages for the breach, including attorneys' fees incurred in pursuing its breach of contract action under Ohio Supreme Court and Sixth Circuit precedent.

Specifically, the Ohio Supreme Court holds that in the insurance context, a party suing to enforce an indemnification contract is entitled to fees incurred in the enforcement action. *Allen v. Standard Oil Co.*, 2 Ohio St.3d 122, 443 N.E.2d 497, 500 (1982). The insured is entitled to recovery of such attorneys' fees regardless of the presence of a duty to defend within the insurance contract. *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 513 N.E.2d 253, 257 (1987). The Sixth Circuit follows *Allen* and *Worth*, permitting insureds—like Scott Fetzer—to recover attorneys' fees in order “to be made whole” after the insurer breaches the policy. *See Bank One, N.A. v. Echo Acceptance Corp.*, 380 F. App'x 513, 525–26 (6th Cir. 2010) (“Because defendants failed to abide by the terms of their agreements, Bank One incurred attorneys' fees and costs associated with the *Hunter* litigation and the present case. As such, Ohio law allows for Bank One to be made whole and recover its attorneys' fees.”). Here, the Sixth Circuit determined that Zurich failed to perform under the contract, thus entitling Scott Fetzer “to be made whole” through an award of damages, including attorneys' fees. The amount in policy limits for which Zurich must

indemnify Scott Fetzer is undisputed. Accordingly, the sole remaining issue is the amount of Scott Fetzer's reasonable attorneys' fees incurred, and Scott Fetzer moves this Court to hold a hearing for such a determination.

Respectfully submitted,

s/ David W. Mellott

David W. Mellott (0019485)

Robert E. Haffke (0082451)

James R. Bedell (0097921)

BENESCH, FRIEDLANDER,

COPLAN & ARONOFF LLP

200 Public Square, Suite 2300

Cleveland, OH 44114-2378

Telephone: 216-363-4500

Facsimile: 216-363-4588

Email: dmellott@beneschlaw.com

rhaffke@beneschlaw.com

jbedell@beneschlaw.com

*Attorneys for Plaintiff The Scott Fetzer Company*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 16, 2019, a copy of the foregoing *Motion for Entry of Judgment* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

s/ David W. Mellott

David W. Mellott